UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO, Employer, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO, Petitioner.	Case No. 28-CA-060841

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND NATIONAL EMPLOYMENT LAW PROJECT AS AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

On August 1, 2018, the National Labor Relations Board ("the Board") issued a notice and invitation to file briefs concerning whether the Board should adhere to, modify, or overrule its decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014). The notice also asked whether, in the event that *Purple Communications* is overruled, the Board should return to the holding of *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), or adopt some other standard. Further, the notice asked whether the Board, if it returns to the *Register Guard* standard, should carve out exceptions for circumstances where employees' ability to communicate other than through their employer's email system is limited, such as in scattered workforce situations or in areas that lack broadband access. The notice also asked whether any such carve-outs should be specified in advance or decided on a case-by-case basis. Finally, the notice asked whether the standard at issue should remain limited to employer email systems or apply more broadly to other types of electronic communications.

INTEREST OF PARTIES

The Service Employees International Union ("SEIU") is an international labor organization with members distributed throughout a wide geographic area. SEIU has a significant interest in the issue of employee email use because many of its members work remotely from one another and depend on email to communicate. Those members are subject to a myriad of employer electronic-use policies.

SEIU has also developed expertise in the use of new communication technologies as the union has had to adapt in order to reach members and communicate with the public effectively. SEIU has a robust online outreach program that utilizes a number of digital and mobile technologies to reach workers and activists, as well as to help new members in organizing. As

part of its online presence, SEIU uses email, text messaging, and social media platforms such as Facebook[1], Twitter[2], and YouTube.[3]

In SEIU's considered view, developed on the basis of its experience, the rapid technological change occurring in workplaces around the country militates in favor of the Board's developing a flexible standard that can withstand the test of time, i.e., a standard that administrative law judges and the Board itself will be able to apply easily to emergent technologies.

The National Employment Law Project (NELP) is a non-profit organization with 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all working people receive the full protection of labor and employment laws, including the right to engage in protected concerted activity. Technology is challenging courts and administrative bodies to consider workers' rights and legislative intent with a full appreciation of the realities of the modern workplace. NELP publishes policy briefs on the role of technology on the workforce, for example, the advent of app-based work assignments, and has participated as amicus in numerous cases involving the role of changing technology in labor and employment laws.

SEIU and NELP thank the Board for the opportunity to submit this brief addressing these important issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Board in *Purple Communications* held that employees have a presumptive right to use work email for protected communications during nonwork time in cases where employers

[1] https://www.facebook.com/SEIU/timeline
[2] https://twitter.com/SEIU
[3] https://www.youtube.com/user/SEIU

have given employees access to their email systems. 361 NLRB at 1050. The Board also held that an employer may justify a total ban on nonwork use of email, including for Section 7 purposes during nonwork time, only "by demonstrating that special circumstances make the ban necessary to maintain production or discipline." Ibid.

SEIU urges the Board to reaffirm *Purple Communications* with needed modifications and to reject again the outdated *Register Guard* standard. As explained below, the reasons for rejecting *Register Guard* in favor of *Purple Communications* are stronger today than they were in 2014. Indeed, even *Purple Communications* itself is now to some extent outdated and should be modified so that (1) the presumptive right to use work email for Section 7 activity is not limited to nonwork time and (2) application of its standard is not limited to employer email systems but extends to other electronic communication systems used by employers to communicate with their employees and made accessible to employees for communication with each other.

I. THE REASONS FOR REJECTING *REGISTER GUARD* ARE STRONGER TODAY THAN THEY WERE IN 2014.

The Board in *Register Guard* deviated from principles articulated in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and did so for reasons that were inadequate at the time and have not fared well since. *Register Guard* reflects an outdated view of digital communication, and the technological reasons for rejecting its approach have only grown stronger with time.

A. *Register Guard* Was an Unjustified Deviation from the Principles Articulated in *Republic Aviation*.

In its seminal decision in *Republic Aviation*, the Supreme Court explained that a careful balance must be struck between "the undisputed right of self-organization assured to employees … and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797–98. In *Republic Aviation* itself, an employee was discharged

for passing out union cards in the plant on his own time during lunch. Id. at 795. The Court upheld the Board's determination that a rule prohibiting all solicitation at any time on the employer's premises was unlawfully overbroad and held that the employer had to permit solicitation on its property during nonwork time. Id. at 803.

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978), is a good example of application of *Republic Aviation*'s balancing standard. *Beth Israel Hospital* involved a solicitation rule that permitted employees to solicit and distribute literature to coworkers during nonworking time in employee-only areas but prohibited those activities in patient-care areas, other work areas, and any public areas of the hospital, including the cafeteria. The Supreme Court upheld the Board's finding that the rule prohibiting solicitation in the cafeteria violated Section 8(a)(1) because the possibility of disruption was remote, and the hospital had permitted employees to use the cafeteria for other types of solicitation. 437 U.S. at 490, 507.

In reaching its decision in *Beth Israel Hospital,* the Supreme Court relied on *Republic Aviation,* quoting it as articulating "the broad legal principle" that should govern in "myriad factual situations":

> "[The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee."

Beth Israel Hosp., 437 U.S. at 492 (quoting *Republic Aviation,* 324 U.S. at 797–98) (alterations in *Beth Israel Hosp.*). That principle first articulated in *Republic Aviation* was then "further developed in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), where the court stated: 'Accommodation between [employee-organization rights and employer-property rights] must be

obtained with as little distinction of one as is consistent with the maintenance of the other.'" *Beth Israel Hospital*, 437 U.S. at 492.

The Board departed from *Republic Aviation* in *Register Guard*, when it upheld a policy that prohibited employees from using the employer's email system for any "non-job related" solicitations. 351 NLRB at 1110. The Board majority relied on cases upholding rules that restricted use of employer equipment, such as a break room television, citing *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 230 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001). But as the dissenting opinion in *Register Guard* correctly points out, email is not functionally similar to a television or a bulletin board, *see* 351 NLRB at 1125, and when the Board in *Purple Communications* later reversed *Register Guard*, it did so in part because that decision "disregarded the material factual differences between email and other types of communications equipment that the Board has considered." *Purple Communications*, 361 NLRB at 1058.

As discussed in greater detail below, email is not fixed like a television or bulletin board but can in most cases be checked at work or at home, on personal or employer devices. Email is also not meaningfully limited in capacity, as those other fora are, given today's very low data storage costs. Email is also vastly more important for organizing purposes than a single television or bulletin board. Indeed, for some bargaining units that include employees who work from home, or who otherwise work remotely, electronic communication may be workers' *only* effective means of communication.

The latter fact demonstrates the *Register Guard* majority's error in attempting to distinguish *Republic Aviation* on the ground that the email policy before it would still permit face-to-face solicitation. *Register Guard*, 351 NLRB at 1115. When one actually considers the reality of modern workplaces, opportunities for face-to-face solicitation are no substitute for

electronic communication—*especially* given that employers can use electronic tools to convey antiunion messages to all employees at once, in emails that can often be read at home or at work and on employees' personal devices. A "balance" that allows employers full use of electronic communication tools for antiunion messages while limiting employees to face-to-face interaction is no balance at all.

The Board erred in *Register Guard* when it departed from the principles of *Republic Aviation* and that error has only become clearer with time.

B. A Legal Test Based on Notions of Distinct Employer Property Is Impracticable Vis-à-Vis Digital Communication.

The rapid technological change that made *Register Guard* outdated in 2014 has continued and even accelerated. Employees' use of email for both business and personal purposes is ubiquitous, and employees can now carry their work home in their pockets. The way in which electronic communication has become pervasive in our working and personal lives—with work and personal accounts generally available from anywhere, on any device, with data often stored in the cloud—make a test based on notions of distinct employer "property" almost comically outmoded.

Technology has changed significantly since the Board issued *Register Guard* in 2007 and even more so since 2001, when the events at the heart of *Register Guard* occurred. In the early part of this century, smartphones, instant mobile messaging applications, Bring Your Own Device (BYOD) to work policies, and YouTube did not exist or were just coming into being. In 2001, email was a cutting edge technology. By 2014 it was merely one of many forms of online communication used by employees to perform their work and communicate with their coworkers. The dissent in *Purple Communications* predicted that the use of email would decline, but the average American worker now spends 6.3 hours per day on email, and the trend shows no

sign of letting up.[4] Indeed, a May 2017 study found that over half of workers prefer digital communication with colleagues; only 1 in 5 employees prefer to meet face-to face.[5]

Other statistics show dramatic technological changes as well. At the time *Register Guard* was issued in 2007, the iPhone was still in its infancy. Facebook, the now ubiquitous social media platform, had only 20 million users and Twitter was largely unknown. In 2014, workers used their iPhones or other mobile devices to communicate with each other on Twitter and Facebook, which had 255 million users and more than one billion users respectively.[6] Today both platforms have even more users, with Twitter reaching 335 million users and Facebook two billion users worldwide.[7]

Importantly, workers today use their own devices not only for personal communication but also for work purposes. In 2014, SEIU argued that whatever rule the Board adopted had to account for the reality that employers were increasingly establishing BYOD policies to control how workers shared information on their personal devices and to incentivize workers to bring their own devices to work. According to a study by Grand View Research, the BYOD market in

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[4] Patricia Reaney, *U.S. Workers Spend 6.3 Hours A Day Checking Email: Survey* (Aug. 26, 2015), https://www.huffingtonpost.com/entry/check-work-email-hours-survey_us_55ddd168e4b0a40aa3ace672.

[5] *Can We Chat? Instant Messaging Invades the Workplace* (Jun. 8, 2017), https://www.reportlinker.com/insight/instant-messaging-apps-invade-workplace.html.

[6] Number of Monthly Active Twitter Users Worldwide from 1st Quarter 2010 to 2nd Quarter 2018 (In Millions), https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/ (last visited Sept. 30, 2018); Number of Monthly Active Facebook Users Worldwide As of 2nd Quarter 2018 (In Millions), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited Oct. 2, 2018).

[7] *See supra* note 6; *see also* Cathleen Chaykowski, Mark Zuckerberg: Facebook's 2 Billion Users Means Facebook's 'Responsibility is Expanding' (Jun. 27, 2017), https://www.forbes.com/sites/kathleenchaykowski/2017/06/27/facebook-officially-hits-2-billion-users/#14778a053708 (last visited Oct. 2, 2018).

2013 accounted for $76 billion in economic activity and is projected to increase up to nearly $80 billion by 2020.[8] As of 2016, 6 out of 10 companies had a BYOD policy.[9]

The dual use of devices for both work and home raises serious questions concerning property interests and workers' rights. For example, if a worker sends an email to a union from his or her personal smartphone while using the employer's wireless Internet network, is that a personal email? Is it personal during the writing but not personal while traveling on the network? What if the employer requires that the employee use its wireless network for all email sent onsite from personal devices in order to protect the employer's systems? What if the worker tries to send the email from home, but the message remains in his or her outbox until the employee arrives at work and then is sent? With recent advances in storage capacity and the increasing use of "the cloud" to manage and store data, what exactly constitutes the employer's property? The phone? The network? The server? The cloud? What if an employer establishes a Virtual Private Network that allows for information to travel over public Internet bands in an encrypted manner? Would that be the employer's property?

As these questions demonstrate, the dual use of personal devices, with the concomitant traveling of data from those devices through employer email systems and through third-party servers, makes lines drawn on the basis of who owns certain property nearly impossible to administer. Thus, the standard the Board set forth in *Register Guard* is obsolete in today's world.

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[8] Bring Your Own Device (BYOD) Market Analysis by Device etc., https://www.grandviewresearch.com/industry-analysis/bring-your-own-device-market (last visited Oct. 2, 2018).

[9] Michael Lazar, *BYOD Statistics Provide Snapshot of Future* (Nov. 16, 2017), https://www.insight.com/en_US/learn/content/2017/01182017-byod-statistics-provide-snapshot-of-future.html.

Equally important, employees today not only use text, instant messaging, social media, and other non-email methods to keep up with their friends but also often to communicate with co-workers and at the behest of their employers. According to a 2013 study by management consulting firm Towers Watson:

- 56% of employers encourage their employees to use social media tools during work hours to build community;
- 51% of workers use SMS (text) messaging to communicate with each other for work-related purposes;
- 73% of workers use some type of instant messaging application to perform work or communicate with their colleagues;
- 53% use social networks to communicate with one another; and
- 44% use apps or other mobile approaches.[10]

And these statistics are consistent with other available data. For example, according to a recent Harvard Business Review study, use of social media on the job is a major boon to collaboration and productivity for employees in the workplace.[11] And by 2015, the percentage of workers using SMS (text messaging) for business purposes had increased from 51% in 2013 to 80%.[12]

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[10] *Just Over Half of Employers Using Social Media Tools for Internal Communication, Towers Watson Survey Finds*, Willis Towers Watson (May 23, 2013), http://www.towerswatson.com/en-US/Press/2013/05/just-over-half-of-employers-using-social-media-tools-for-internal-communication (last visited Sept. 30, 2018).

[11] Lorenzo Bizzi, *Employees Who Use Social Media for Work Are More Engaged — But Also More Likely to Leave Their Jobs,* Harv. Bus. Rev., May 17, 2018, *available at* https://hbr.org/2018/05/employees-who-use-social-media-for-work-are-more-engaged-but-also-more-likely-to-leave-their-jobs.

[12] Nathan Eddy, *Business Texting Grows More Widespread* (May 22, 2015), http://www.eweek.com/small-business/businesses-texting-grows-more-widespread.

This merging of personal and work activity on devices and platforms shows no signs of slowing down. In this environment, where work is done on personal devices and vice versa, using a variety of platforms with varying levels of connection to the employer, and one message or post may travel over home-based, employer-based, and third-party networks, drawing sharp lines between "employer" and "employee" property is effectively impossible and makes no sense.

C. Trends Toward Flexible Working Arrangements and Remote Work Make Use of Digital Communication Tools for Section 7 Activity More Important than Ever.

Another trend that undermines *Register Guard* is the trend toward telecommuting and remote work, which makes use of digital communication methods for Section 7 activity more important than ever.

When *Register Guard* was decided in 2007, telecommuting and remote work were relatively rare, in part because technology was not sufficiently advanced or available. In 2011, according to a Pew report, only 35% of American adults owned a smartphone. By 2017, that number was 77%.[13]

Not surprisingly, employees' practices have changed along with the development and spread of advanced technology. According to recent Gallup polls, 79% of working adults see it as an advantage that they can use their devices to work remotely outside of normal business hours, and 63% of those who have work email report checking it outside normal working time

[13] Aaron Smith, *Record Shares of Americans Now Own Smartphones, Have Home Broadband*, Pew Research Ctr. (Jan. 12, 2017), http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/.

either frequently or occasionally. Meanwhile, 35% of employed adults report using a personal email account for work-related emails.[14]

In addition to checking emails outside the office, an increasing number of employees telecommute as their primary mode of working, making traditional face-to-face communication among co-workers less likely. Telecommuting has increased 140% from 2005 to 2018, according to Global Workplace Analytics, and the increase in telework seems to be accelerating rather than slowing down. The number of telecommuters grew 11.7% from 2015 to 2016, the largest single year over year growth since 2008.[15] Indeed, the NLRB increasingly encounters cases involving employees who work from home,[16] and even when employees work outside their homes, they still may not gather with co-workers in any one space because digital communications makes doing so unnecessary.

Adjunct university faculty provide many examples of this trend. An estimated three-quarters of university faculty teach in part-time, contingent positions. Most universities do not give adjunct faculty full or effective use of campus facilities, such as office space, telephones, and computers, leaving adjuncts little choice but to use personal devices for professional

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[14] Jeff Jones & Lydia Saad, Gallup News Service: March Wave 2 (Mar. 9–29, 2017), *available for downloading at* https://news.gallup.com/poll/210074/email-outside-working-hours-not-burden-workers.aspx; Jim Harter, *Should Employers Ban Email After Work Hours?*, Gallup (Sept. 9, 2014), https://www.gallup.com/workplace/236519/employers-ban-email-work-hours.aspx.

[15] *Telecommuting Trend Data (updated July, 2018)*, https://globalworkplaceanalytics.com/telecommuting-statistics.

[16] See *Guide Dogs for the Blind, Inc.*, 359 NLRB 1412, 1414 (2013) ("Many community field representatives work out of their homes"); *Star West Satellite, Inc.*, 19-CA-075668, at 9 (Nov. 4, 2013) ("remote technicians are bargaining unit technicians who work from their homes"); *Am. Red Cross Ariz. Blood Servs. Region*, 28-CA-23443, at 8–9 (Feb. 1, 2012) (involved Donor Recruitment Representatives who were permitted to work at home three days a week); *Odwalla, Inc.*, 357 NLRB 1608 (2011) (involved merchandisers who worked from home).

purposes. And perhaps the greatest obstacle that adjunct faculty face in organizing is the difficulty of reaching out to fellow bargaining-group members who can be geographically dispersed and whose work is structured in a way that affords little opportunity for face-to-face contact.

One professor from Loyola Marymount University testified before the Board in 2014 about the difficulty of communicating with other bargaining unit members in this kind of environment.[17] Dr. Darrin Murray focused on "fieldwork supervisors," a group of employees who did not work primarily on campus:

> [The employer] knew who the fieldwork supervisors were from the beginning. [The employer] had been using work emails to send anti-union messages to employees right from the beginning, even before the hearing and the petition was filed. . . . I want to tell my coworkers that we are the union, we are the ones organizing, but I feel limited in getting that message out there. . . . We're still trying to cobble together accurate contact information for our unit and especially for the fieldwork supervisors. . . . . [O]ne of my colleagues who was against forming a union somehow or another had a complete list of every e-mail address for every adjunct in the entire university and was able to send out his e-mail message to everyone. [18]

The dangers to Section 7 rights posed by policies that prevent employees from using employer electronic systems are exacerbated when employers are able to use those same systems for antiunion campaigns. Dr. Murray's testimony revealed that the university had numerous ways to contact its individual divisions, individual schools, and individual departments—and that it used those avenues of digital communication to communicate antiunion messages.[19]

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[17] Tr. of Proceedings at II:397, *Notice of Proposed Rulemaking, Representation Case Procedures* (Apr. 11, 2014), *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4233/publicmeeting4-11.pdf.

[18] Id. at 597, 599.

[19] Ibid.

D. Employers' Weak Arguments About Section 7 Communications Burdening Their Servers Are Even Weaker Now Than When *Purple Communications* Was Decided.

In the past, employers have argued that Section 7 email among workers will impose unreasonable burdens on their servers. Those arguments were untenable in 2014 and are even weaker now.

The costs of processing and storing data have declined dramatically and are effectively negligible. According to Computerworld magazine, the cost of storing one gigabyte of data declined from $1.05 million dollars per year in 1966 to 79 cents in 2005, shortly after the *Register Guard* decision, then from 79 cents to five cents per year after the Board issued its decision in *Purple Communications,* and then from five to two cents per year by March 2017.[20]

One gigabyte of storage can hold 100,099 emails that average 1.5 pages of text,[21] and, according to recent Board data, the average petitioned-for bargaining unit comprises 24 people.[22] That means even if every single member of a 24-person unit sent 4,170 union-related emails during a one-month election period, their total emails could not possibly cost more than two cents in storage. Furthermore, many employers will not incur *any* storage costs because data

[20] Lucas Mearian, CW@50: Data Storage Goes from $1M to 2 Cents Per Gigabyte, Computerworld (Mar. 23, 2017), https://www.computerworld.com/article/3182207/data-storage/cw50-data-storage-goes-from-1m-to-2-cents-per-gigabyte.html.

[21] *How Many Pages in a Gigabyte?* LexisNexis, https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf (last visited Sept. 30, 2018).

[22] *Median Size of Bargaining Units in Elections*, NLRB, http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections (last visited Sept. 30, 2018).

storage has become so cheap that Google allows users to store 15 gigabytes of information, equal to 1.5 million emails, for free.[23]

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All of these trends provided support for the Board's decision to overrule *Register Guard*, which had weighed employers' property rights heavily while giving little import to the increasing use of email as a dominant means of communication. Recognizing the reality of near-constant digital connectivity, and the related breakdown of walls between personal and work communication, the Board appropriately held in *Purple Communications* that employees have a presumptive right to use a work email system for statutorily protected communications on nonwork time if their employer has given employees access to that system. The Board also recognized an exception that allows an employer to ban nonwork use of email if the employer can show special circumstances that make the ban necessary to maintain production or discipline.

The *Purple Communications* standard was a great improvement and should largely be reaffirmed, including with respect to its exception for special circumstances. The standard's limitation to nonwork time, however, is unreasonable given the reality of how and how often people check email. Indeed, the phrase "nonwork time" effectively loses meaning when one considers available data about how often people use their mobile devices for work on what in the past would have been considered "nonworking time."

II. *PURPLE COMMUNICATIONS* SHOULD NOT BE LIMITED TO WORK TIME AND SHOULD COVER NON-EMAIL FORMS OF COMMUNICATION.

A legal framework for protected speech that depends on a bright line between work and nonwork time simply does not make sense with respect to digital communication. As Member

[23] *Storage Limits*, Google, https://support.google.com/a/answer/1186436?hl=en (last visited Aug. 27, 2018).

Johnson noted in his dissent in *Purple Communications*, the "technology of email does not respect the 'working time'/'break time' boundary." 361 NLRB at 1098. The sender of an email may not know when she hits send whether the intended recipient is working, and the recipient may not be able to tell from the email's subject line whether the message is work related or not. Ibid.

Although Member Johnson made these points in support of an argument that employees should be denied access to employer email, SEIU believes the data—when considered together with the technological changes that have made electronic communication essential for meaningful exercise of Section 7 rights—support the opposite result. Because a limitation to "nonwork time" is effectively impracticable, and because bans on use of work email would, in today's day and age, severely burden Section 7 rights, *Purple Communications* should be modified so that its standard is not so limited. [24]

The proliferation of personal mobile devices, combined with the increase in employer supported "Bring Your Own Device" policies, has muddled the line between work and personal time. Employers have created BYOD policies as a way to permit employees to use their preferred personal devices, such as smartphones or tablets, to perform their work from any location while at the same time protecting how that information is used. Some BYOD policies

[24] In *Republic Aviation*, discussed above, the Board addressed solicitation of union cards and held that such solicitation could be limited to nonwork time. But email is much more akin to a "no talking rule" than to card solicitation, which makes that aspect of the *Republic Aviation* decision inapposite. The Board has held that an employer may prevent employees from talking about a union during work time only if such a prohibition also applies to all nonwork related subjects. However, an employer violates the Act when employees are not allowed to discuss unionization but may talk about other subjects unrelated to work. See *G4S Secure Solutions (USA) Inc.*, 364 NLRB, No 92, slip op. at 2–3 (2016) (citing *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003)). This analysis should apply to email as well.

also include provisions that require employees to load tracking programs on their phones to permit the employer to locate its employees or to erase information on lost devices.[25]

These technological advances have allowed employers to focus on productivity rather than on hours in the office, further blurring the line between work and personal time. Reinforcing this trend are certain social and demographic patterns, such as increasing numbers of dual-income households, employees with dependents, and single parent families, as well as the rise of the Millennial class—all of which have contributed to the growing popularity of flexible workplace arrangements (FWAs).

Indeed, FWAs are likely to continue expanding as more Millennials enter the workforce: A November 2014 study published by Bentley University found that 77% of millennials believe flexible work hours increase productivity, and 96% consider flexible scheduling to be an important factor in choosing between otherwise equally appealing jobs.[26] The 2014 National Study of Employers also examined the issue of FWAs and found that policies offering workers more flexibility regarding when and where they can work are rapidly increasing. Two-thirds of employers reported that they offered employees some ability to work at home, an increase of

[25] Larry Dignan, *2014 Enterprise Trends: BYOD Pain, HTML5 Apps, Hybrid Cloud, SDx*, ZDNet (Oct. 8, 2013), http://www.zdnet.com/2014-enterprise-trends-byod-pain-html5-apps-hybrid-cloud-sdx-7000021705/.

[26] The Millennial Mind Goes to Work: How Millennial Preferences Will Shape the Future of the Modern Workplace, Bentley University (Oct. 2014), https://www.slideshare.net/BentleyU/preparedu-the-millennial-mind-goes-to-work-41415813.

17% as compared to six years earlier.[27] Flexible work arrangements are "no longer the exception" and are now "critical for organizations to maximize their talent pool."[28]

In this environment—where employees blend work and personal activity in the same time blocks, manage both their work and family lives from one set of devices and accounts, and often switch from work to personal communication minute by minute (or even within a single email)—drawing sharp lines between "work time" and "nonwork time" becomes effectively impossible. Meanwhile, employers have by necessity had to develop new tools for monitoring and ensuring productivity among employees who work remotely, i.e., outside supervisors' line of sight, and those tools reduce the need for a nonwork-time-only rule for protected communication. For example, as FWAs have become more common, employers have tended to structure compensation and performance reviews based on production as opposed to time spent in the office. And under a productivity-based standard, what constitutes "work time" versus "nonwork time" does not matter; employees who get their work done well and in a timely manner are rewarded, regardless of where they do it or at what time of day or night, and employees who do not get their work done are not.

Moreover, even in those environments where the distinction between work and nonwork time is still important, employers retain the right to discipline employees who fail to meet performance standards, e.g., because they spend too much time doing nonwork activity on their devices, whether that activity is Section 7 protected or is watching hours of cat videos on YouTube. There is nothing in *Purple Communications* that forces any employer to tolerate an

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[27] Kenneth Matos & Ellen Galinsky, *2014 National Study of Employers* 20, 23 (Families and Work Institute et al., 2014).

[28] Anna Beninger & Nancy Carter, *New Research: Flexibility Versus Face Time*, Harv. Bus. Rev. (July 8, 2013), *available at* http://blogs.hbr.org/2013/07/new-research-flexibility-versu/.

employee's poor performance, and that will not change if the decision's standard is extended to nonwork time in acknowledgment of the reality that digital communication does not operate within traditional working-hours boundaries. Furthermore, amici support maintaining the special-circumstances exception that permits employers in extreme circumstances to ban all non-business-related emails where other tools for ensuring productivity are not available or fail.

In addition to eliminating *Purple Communications'* archaic restriction to "nonwork time," the Board should extend its approach in *Purple Communications* beyond email to other forms of electronic communication as well. As discussed above, employees today use text, instant messaging, social media, and other non-email methods to communicate with their co-workers. Indeed, workers are often urged by their employers to do so. An approach that limits *Purple Communications* to email simply does not take account of how modern workplaces actually function.

III. A *REGISTER GUARD* STANDARD WITH CARVE-OUTS WOULD BE UNCLEAR, LEAVING WORKERS UNCERTAIN OF THEIR RIGHTS.

For all the reasons already given, SEIU and NELP firmly believe that *Purple Communications* should be affirmed and extended beyond nonwork time. The alternative suggested by the Board's questions—namely, reinstating *Register Guard* with some potential carve-outs—would be difficult to administer and would inevitably have a chilling effect on protected Section 7 activity, especially if applied on a case-by-case basis.

First, a return to *Register Guard* would create significant line-drawing problems and inevitably leave some Section 7 activity unprotected. Employers, workers, and judges will struggle to determine when exactly a given workplace crosses a line into being geographically dispersed enough to merit an exception. Imagine an employer that is cutting office-space costs by moving more employees to telework. When exactly would that working environment reach

the point of qualifying for an exception? When more than 50% of employees work at home? More? Fewer?

Drawing these distinctions becomes even more complicated when one considers the various options for determining bargaining units. Imagine a workplace with 30 customer-service representatives and 50 sales representatives, where each group could appropriately be a separate unit or the two groups could be combined into a single unit. If the customer-service representatives work from home but the sales representatives work in the office, then the customer-service representatives would seemingly qualify for a *Register Guard* exception if they were to petition as a discrete unit but not if they were considered part of the same unit as the sales representatives.

The Board's invitation for briefs mentioned another potential exception based on broadband access that would be similarly inadministrable. What if a potential bargaining unit initially lacked broadband access but then a new service provider entered the area? Would those employees' right to use work email for Section 7 purposes expire when a certain percentage of employees signed up for service? Or when a certain percentage merely had the opportunity to sign up for broadband?

Second, and equally important, a return to *Register Guard* with case-by-case exceptions will inevitably chill protected expression. If the rules are uncertain and to be determined ad hoc, employees will not risk discipline by sending an email to organize coworkers around a workplace issue or in support of a union. Without more certainty about their rights, employees will be chilled from using work email for Section 7 purposes, even if they ultimately would fall into an exception to the *Register Guard* rule.

It is difficult to imagine how the Board could return to *Register Guard* with exceptions clear enough that employees who fall within those exceptions will feel comfortable exercising their right to use work email for union activity. Returning to a presumption that there is no right to use work email for Section 7 purposes, even on nonwork time, will inevitably block protected speech.

CONCLUSION

The Board should not attempt to turn back time by returning to *Register Guard.* That decision was legally incorrect and technologically outmoded when issued, and the increased blurring of work and nonwork time, reliance on electronic communication, and implementation of flexible workplace arrangements have only made it more so. The impact that employee use of work email has on employer "property" has also declined—even as the importance of electronic communication for meaningful Section 7 rights has grown.

For all these reasons, SEIU and NELP respectfully urge the Board to adhere to *Republic Aviation* and *Purple Communications* with necessary updates to eliminate nonwork time restrictions and to encompass non-email forms of communication.

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Respectfully Submitted,

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